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No. 98-176

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In The

Supreme Court of the United States

October Term, 1997

FRED E. YOUNG, INC.,

Petitioner,

vs.

BRUSH MOUNTAIN SPORTSMEN'S ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Pennsylvania Superior Court on a state law issue affords any basis for review in this matter.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding as Fred E. Young, Inc., Petitioner and Brush Mountain Sportsmen's Association, Inc., Respondent. There is no parent or subsidiary company of any party to be listed.

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STATEMENT OF THE CASE

This case involved a dispute as to the title of rural land in what is now Blair County, Pennsylvania. The dispute arises from apparent overlapping surveys of the William Allen and John Porter warrants and the Ludwick Sells warrant. The Statement of the Case up to the filing of this petition is accurately set forth in the opinion of the Pennsylvania Superior Court as follows:

> During the late 1700's, the parties' predecessors in title, Ludwick Sells, William Allen and John Porter, began to settle the Pennsylvania wilderness in what is now Blair County. Ludwick Sells was granted a warrant in 1786, but did not have his property surveyed until 1794. The Porter and Allen tracts were respectively warranted and surveyed in 1795 and 1796. However, both the Porter and Allen warrants noted that there were improvements on the land and that the owners' respective interests commenced as of 1792. Patents were later issued for the Porter, Allen and Sells tracts in 1800, 1808 and 1834, respectively.
>
> The surveys of the Porter, Allen and Sells tracts were all performed by the same individual, John Canan. The Sells survey identified William Allen and Michael Fetters as adjoining landowners. Neither the Porter nor Allen surveys referred to Sells as an adjoiner, however. For reasons which are unclear, Sells did not settle on the land identified in his survey as adjoining that of Allen and Fetters. He instead located to the southwest on a tract adjoining John Porter's land.
>
> Appellee, Brush Mountain Sportsmen's Association (Brush Mountain), acquired the land formerly owned

by John Porter by two separate conveyances in 1948 and 1949. Appellant, Fred E. Young, Inc. (Fred Young) subsequently purchased the former Sells tract in 1965. After appellant bought the property, a dispute arose between the parties as to the ownership of approximately forty acres of land encompassed within the metes and bounds descriptions of both the Sells and Porter tracts. Consequently, appellant commenced a quiet title action against appellee in April of 1966.

The Honorable Samuel Jubelirer conducted hearings thereon in September, 1967, March 1968 and July, 1968. For reasons which do not appear of record, the case languished in the Court of Common Pleas until 1981. On June 10, 1981, Judge O'Kicki issued an order denying appellant's quiet title action, but this order was not entered upon the docket until April 16, 1984. Appellant timely filed exceptions, as well as post-trial motions and supplemental post-trial motions to the trial court's order. Judge O'Kicki dismissed the exceptions in October of 1986, but a final judgment was never entered. No appeal was taken.

Appellant renewed its request for relief by filing the instant declaratory judgment action against appellee in February of 1991. Appellee filed preliminary objections asserting that the action was barred by reason of the doctrine of res judicata. Judge Jolene Grubb Kopriva agreed and dismissed appellant's complaint. Appellant timely appealed to this court. In an unpublished memorandum, we reversed an remanded for trial. *See Fred E. Young, Inc. v. Brush Mountain Sportsmen's Association,* 424 Pa. Super.

> 658, 617 A.2d 399 (1992) (No. 02000 Pittsburgh 1991). The Supreme Court declined to grant *allocatur*. *Id.*, 533 Pa. 611, 618 A.2d 401 (1992).
>
> Upon remand of the case, appellant filed a motion for summary judgment as well as a petition for rule to show cause why certain other property owners should not be notified of this litigation and permitted to intervene therein. The trial court denied both motions. The Honorable Noman D. Callan, sitting as the sole trier of fact, conducted a three day trial on September 27 and 28, 1995 as well as on December 27, 1995.
>
> Judge Callan filed an adjudication and decree *nisi* in February 1996. Appellant timely filed post-trial motions which were ultimately dismissed. A final decree was thereafter entered upon the docket. Appellant timely appealed therefrom. Opinion of the Pa Superior Court No. 00659 Pgbh at page 96.

Following denial of Allowance of Appeal by the Pennsylvania Superior Court, Petitioner filed the instant petition for a Writ of Certiorari alleging that

> the Superior Court of PA violated Petitioner's constitutional right not to be deprived of its property without due process of law in finding that Petitioners predecessors in title had forfeited Petitioners right to claim superior title by their not attacking the tax sale through which Respondent based its claim of ownership.

(Petition).

The Petition, however, misrepresents what the Superior Court said and the basis for the Courts' opinion since the discussion with respect to the tax sale was not the holding of the Court. By misrepresenting the holding of the Superior Court and reaching erroneous conclusions as to the law, Petitioner seeks to create a basis for review by this Court of a fact sensitive determination founded entirely upon state law. Both Judge O'Kicki, the trial judge in the action to quiet title, and Judge Callan, the trial judge in the instant proceeding found that the evidence relating to the nature and substance of alleged adverse possession by Petitioner and his predecessors in title was not of sufficient quality to establish adverse possession under the law of Pennsylvania irrespective of the tax sale in question. What the Court did say with respect to the tax sale was that it eliminated any unripened adverse possession that may have existed prior to the sale.

REASONS FOR DENYING THE WRIT

I.

THE FINDING OF THE PENNSYLVANIA SUPERIOR COURT COMPLAINED OF IS MERE DICTA AND THIS CANNOT RESULT IN THE DEPRIVATION OF A CONSTITUTIONAL RIGHT OR A BASIS FOR REVIEW.

In order for a determination of the State Court to be reviewable by this Court it must be a final judgment of the highest court of the state where, inter alia, the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution. 28 U.S.C.A. § 1257. To be encompassed within a final judgment of the State Court the determination in question must be a holding of the Court. If it is mere dicta, and not the holding of the Court it cannot operate to deprive Petitioner of a right and is thus not reviewable and

similarly if it is only tangential to the immediate question it is also not reviewable. *Pennsylvania v. Board of Directors of City Trusts,* 353 U.S. 230, 1 L. Ed. 2d 792 (1957). Furthermore, this Court has stated many times that it will not review judgments of state courts that rest on adequate and independent state grounds. *Herb v. Pitcairn* 324 U.S. 117, 125, 89 L. Ed. 789, 794 (1945). Petitioner claims that the Superior Court decided that a tax sale in Respondent's chain of title cut off any period of adverse possession on the part of Petitioner (allegedly in violation of his due process rights) and prevented any rights of adverse possession from accruing during the time in which title was in the County of Blair as a result of the tax sale. This analysis was not part of the holding of the Superior Court.

The Superior Court held that Respondent's chain of title was superior from the inception of the warrant, since Ludwick Sells, Petitioners predecessor, had abandoned his claim by not surveying the property or establishing improvements within seven years of his application for the warrant, all in accordance with Pennsylvania law. Contrary to Petitioners assertion that the tax sale was dispositive of the issue of adverse possession, the Superior Court disposed of the issue of adverse possession as follows:

> In its second allegation of error, appellant contends that it acquired title to the property by adverse possession. Appellant does not support his argument with citation to any pertinent legal authority in contravention of Pa. RAP, Rule 2119, 42 Pa. C.S.A. When appellant has failed to cite any authority in support of a contention, the claim is waived. *Bunt v. Pension Mortgage Associates, Inc.*, 446 Pa. Super. 359, 368, 666 A.2d 1091, 1095 (1955). Opinion of the PA Superior Court to No. 00659 Pgbh 96 at Page 11.

The Superior Court, in the next sentence goes on to say: "However, appellant would not be entitled to any relief *even if we were to consider this issue.*" (Emphasis added). The Court then went on to review the evidence of adverse possession and in the course of that discussion reviewed the issues regarding the tax sale in question. It is clear that this discussion is hypothetical and is not part of the holding in the case, as the Court held that the issue of adverse possession was procedurally waived. Thus the issue is not reviewable because the entire subject of adverse possession was deemed procedurally waived, the discussion relating to the tax sale as a part of the adverse possession issue was mere dicta and the decision rests on adequate state grounds.

II.

ASIDE FROM THE TAX SALE THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE COURTS' DECISION THAT THE EVIDENCE OF ADVERSE POSSESSION ON THE PART OF PETITIONER WAS DEFICIENT.

Even if the issue were not waived and if the discussion of the tax sale and the Court's conclusions in connection therewith were not mere dicta, there is still no basis for review, as the Superior Court and the lower court were correct in their conclusions regarding the insufficiency of evidence of adverse possession. Judge Callan, the trial court judge, chose to adopt the findings of Judge O'Kicki issued in the prior action to quiet title since there was no additional evidence presented by the Plaintiff in regard to adverse possession. In this regard, Judge Callan found as follows:

> 7. With respect to the Plaintiff's reliance on the elements of adverse possession, he has failed to

show that there has been persistent and continual adverse possession for at least 21 years.

8. The Plaintiff has failed to produce any evidence that the use that did occur was not permissive or that such use was hostile to the true owner.

9. The Plaintiff sought to tack the uses of prior predecessors in land without having shown any use exercised by himself on said land. He is not a user and can not tack the uses of the land, if any, by others who may have been predecessors in title. Opinion of Norman D. Callan, Judge 91 CP 000392 Blair County at page 28.

The Superior Court in its opinion indicated that the possession of the Delancey family (Petitioner's predecessor in title) related primarily to the undisputed southern portion of the Sells tract. Thus the statement of the Superior Court, even if it were not dicta, that the tax sale renders the Delancey possession prior to 1936 irrelevant is of no moment because the Delanceys did not exercise continuous adverse possession of the disputed tract and there was certainly no ripened adverse possession resulting from Delancey's possession. The Superior Court acknowledged that there was evidence that the Kneidinger family leased and farmed some portion of the disputed tract from approximately 1940 until the Petitioner purchased the property. The Superior Court also recognized however, that the evidence showed that Respondent began cultivating the disputed land in 1950 and in January 1950 entered into a contract with the State Game Commission regarding cultivation of food plots in the disputed area. There was also evidence that Respondent strung wire fencing in the area at that time and the minutes of Brush Mountain at a meeting held in 1949 indicate that the property was to be enclosed with wire. Brush Mountain entered

into further contracts with the State Game Commission regarding cultivation of food plots on the disputed tract respectively dated May 13, 1961 and August 2, 1976. Thus the alleged adverse possession of Kneidinger is factually unclear and there is substantial evidence to support the conclusion of Judge O'Kicki and Judge Callan that aside from the tax sale the Plaintiff had not met his burden of establishing adverse possession within the standards required by the law of Pennsylvania. Consequently the statement of the Superior Court that the tax sale would have interrupted any period of adverse possession during the time that title was in the County is dicta within dicta as the Court already determined that the evidence was insufficient. Accordingly, no claim of violation of Constitutional rights can be predicated upon the Superior Court's findings with respect to the tax sale as petitioners evidence was deficient to establish adverse possession irrespective of the tax sale. Again this is a judgment of a state court resting on adequate state grounds. *See Herb v. Petcairn, supra.*

III.

THERE WAS NO VIOLATION OF DUE PROCESS IN PASSING TITLE TO THE COUNTY THROUGH THE 1936 TAX SALE.

Further the Petitioner has totally missed the point with respect to the effect of the tax sale. Since Petitioner's chain of title is inferior and Petitioner had no paper title to the disputed tract (as properly determined by Judge Callan and affirmed by the Superior Court) the tax sale would be valid to pass to the County the interest of the actual owner of the tract, in this case the Baker family. Since any adverse possession at that point had not ripened into title in Petitioner's predecessors there was no necessity of notice to them of the tax sale. Unripened adverse possession does not create an interest in the property. *Brennan*

et al. v. Pine Hill Collieries Co. et al., 312 Pa. 52, 167 Atl. 776 (1933). Thus the County held a valid tax title to the property and no adverse possession could accrue during the County's title as adverse possession cannot accrue against a governmental entity holding a tax title. *Torch v. Constantine*, 227 Pa. Super 427, 323 A.2d 278 (1974). It has already been determined factually that the Delanceys did not continuously possess and/or conduct activities on the disputed portion of the Sells tract and the alleged adverse possession by Kneidinger (the substance of which is factually deficient) did not commence until 1940 while the County held title. Thus the Superior Court was absolutely correct in its analysis that the tax sale to the county interrupted any previous unripened adverse possession (if any there be) and eliminated any possibility of adverse possession accruing during the period that the County held title. Since notice to Petitioner's predecessors was not necessary, passage of the superior chain of title to the County through the tax sale and consequent elimination of unripened adverse possession was not a violation of due process rights. Thus Petitioner's claim of a violation of due process rights is clearly an attempt to manufacture a reviewable issue where none exists.

CONCLUSION

For all the reasons set forth above, the Respondent respectfully requests that the Court reject Petitioners' request for a writ of certiorari.

Respectfully submitted,

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